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AUG 21 12 23 PM '95

August 21, 1995

AGENDA ITEM
For Meeting of: AUG 23 1995

MEMORANDUM

TO: The Commission
THROUGH: John C. Surina *John C. Surina*
Staff Director

FROM: Lawrence M. Noble *Lawrence M. Noble*
General Counsel

N. Bradley Litchfield *N. Bradley Litchfield*
Associate General Counsel

SUBJECT: Revised Draft AO 1995-25

Attached is a revised draft of the subject advisory opinion.

The revisions are made to the draft previously considered by the Commission (Agenda Document #95-80) on August 3, 1995. The revisions result from the RNC's letter of August 9, 1995, which responded to the Commission's request for additional facts. The substantive changes are found at pages 2, 3 and 5 of the attached, and they are highlighted with bold print.

We request that this revised draft be placed on the agenda for the special meeting of August 23, 1995.

Attachment

DRAFT

ADVISORY OPINION 1995-25

David A. Norcross, General Counsel
Republican National Committee
310 First Street SE
Washington, DC 20003

Dear Mr. Norcross:

This responds to your letters dated August 9 and June 27, 1995, requesting an advisory opinion on behalf of the Republican National Committee ("RNC"), concerning the application of the Federal Election Campaign Act of 1971, as amended ("the Act"), to costs incurred by the RNC in connection with certain activities to be undertaken in 1995.

You state that the RNC plans to produce and air media advertisements on a series of legislative proposals being considered by the U.S. Congress, such as the balanced budget debate and welfare reform. The purpose of the ads will be to inform the American people on the Republican and Democratic positions on these issues, as well as to attempt to influence public opinion on particular legislative proposals. The ads are intended to gain popular support for the Republican position on given legislative measures, and thereby influence the public's positive view of Republicans and their agenda.

You further state that your request is predicated on the following assumptions: (1) There may or may not be a reference to a Federal officeholder who has also qualified as a candidate for Federal office. (2) If there is reference to a Federal officeholder who is also a Federal candidate, there will not be any express advocacy of that officeholder's

4 election or defeat, nor will there be any "electioneering
5 message" or reference to Federal elections.^{1/} (3) If there
6 is a "call to action," it will be to urge the viewer or
7 listener to contact that Federal officeholder urging support
8 for, or defeat of, a particular piece of legislation. (4)
9 The appropriate Federal Communications Commission disclaimer
10 identifying the RNC as sponsor will be included within each
11 advertisement. (5) The RNC will allocate the salaries of
12 employees associated with this media effort based upon 11 CFR
13 106.5. (6) The RNC will report this media activity and its
14 associated expenses, as appropriate, on financial disclosure
15 reports filed with the Commission.

16 In response to the Commission's request for the text of
17 one or more advertisements that have been or may be
18 disseminated as part of this series, you have provided the
19 texts for three such ads--one urging support for the Balanced
20 Budget Amendment and the other two urging that the Medicare
21 program be saved and restructured. Two ads do not mention a
22 Federal candidate, and all three urge support for the

23 ^{1/} The Commission relies on your statement that those
24 advertisements that mention a Federal candidate or
25 officeholder will not contain any electioneering message. In
26 view of this representation, the Commission does not express
27 any opinion as to what is or is not an electioneering message
28 by a political party committee. The courts and the
29 Commission have addressed the issue of what constitutes an
30 electioneering message by a political party in other
31 circumstances. See Advisory Opinions 1984-15 and 1985-14;
32 Federal Election Commission v. Colorado Republican Federal
33 Campaign Committee, Nos. 93-1433 and 93-1434, 1995 WESTLAW
34 372934 (10th Cir. (Colo.), June 23, 1995).

35 *Saucier has been considered - pending*

"BOLD"

3 Republican position on the issues discussed. The third
4 advertisement (titled "Too Young To Die") mentions President
5 Clinton's name six times, although only in the context of
6 Medicare policy; there is no reference to any election or any
7 candidate. You state that none of these ads served as the
8 basis for this advisory opinion request, and that this
9 material may or may not be comparable to other such
10 advertisements which the RNC may air in the future.

11 You further state that it is impossible to determine
12 what effect these types of advertisements have on the
13 electability of candidates at the Federal, state and local
14 level. You believe the costs incurred in connection with
15 these ads should be considered "administrative expenditures"
16 under the Commission's rules on allocation of certain
17 expenditures between Federal and non-federal accounts.^{2/} If
18 so considered, the regulations provide that the costs should
19 be allocated at least 60% to the RNC's Federal campaign
20 account and 40% to its non-federal account. See 11 CFR
106.5(a) and (b)(2)(ii).

21 The Act requires that contributions accepted and spent
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24 ^{2/} Your letter makes reference to past conduct of the
25 Democratic National Committee ("DNC"). The Commission
26 stresses that this advisory opinion does not address those
27 issues or imply any opinion whether the DNC's conduct was
28 permitted or not permitted under the Act and Commission
29 regulations. Commission regulations state that requests
30 regarding the activities of third parties do not qualify as
advisory opinion requests. 11 CFR 112.1(b).

"BOLD"

to influence any Federal election be received subject to certain limitations and prohibitions. See 2 U.S.C. §§441a, 441b, 441c, 441e, 441f, and 441g. Most of these restrictions do not apply to funds raised and spent to influence only state and local elections.^{3/}

Commission regulations set forth the procedures to be followed by party committees that make disbursements in connection with both Federal and non-federal elections. 11 CFR 106.5. Under section 106.5(a), party committees^{4/} may make such disbursements in one of two ways: They may make them entirely from funds raised subject to the prohibitions and limitations of the Act; or, if they have established separate Federal and non-federal accounts pursuant to 11 CFR 102.5, they may allocate them between these accounts according to various formulas set forth in section 106.5.

The allocation formulas for national party committees to allocate their administrative expenses and generic voter drive costs are found at 11 CFR 106.5(b)(2). The Explanation and Justification to these rules notes that these formulas reflect the national party committees' primary focus on

^{3/} The prohibitions on contributions by national banks, by corporations organized by authority of Federal statute, and by foreign nationals, apply to contributions made in connection with any election whether Federal, state or local. 2 U.S.C. §§441b(a), 441e.

^{4/} The Commission notes that this opinion applies only to covered activity by national party committees. It does not apply to legislative issue advocacy by other entities, such as lobbying expenditures by corporations and their separate segregated funds. See Advisory Opinion 1984-57.

3 presidential and other Federal candidates and elections,
4 while still recognizing that such committees also participate
5 in party-building activities at state and local levels of the
6 party organizations. 55 Fed. Reg. 26058, 26063 (June 26,
7 1990).

8 [After reviewing the additional material ~~you have~~
9 ^{on behalf of the RNC} provided,] the Commission agrees that the legislative advocacy
10 media advertisements discussed in your letter, focusing as
11 they do on national legislative activity, [should be
12 considered as made in connection with] both Federal and
13 non-federal elections. Thus, these costs should be allocated
14 in accordance with 11 CFR 106.5. The Supreme Court in
15 Buckley v. Valeo, 424 U.S. 1, 79 (1976), noted that the major
16 purpose of political committees is the nomination or election
17 of candidates, so their expenditures are, by definition,
18 campaign related. Similarly, the Internal Revenue Code
19 defines the "(tax) exempt function" of a political
20 organization, including a political party or committee, as
21 "the function of influencing or attempting to influence the
22 selection, nomination, election or appointment of any
23 individual to any Federal, State, or local public office . .
24 . or the election of Presidential or Vice Presidential
electors." 26 U.S.C. §527(e).

["BOLD"]

25 Section 106.5(a)(2) establishes four categories of costs
26 to be allocated under these rules: administrative expenses;
27 the direct costs of a fundraising program or event; the cost
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of activities that are exempt from the definitions of contribution and expenditure because they relate to specific state and local party activity; and generic voter drive costs.

You state that you believe the costs of the advertisements should be characterized as administrative expenses, which are defined in a non-inclusive listing at 11 CFR 106.5(a)(2)(i) to include such expenses as rent, utilities, office supplies, and salaries. The Commission ~~notes that, depending on content, administrative expenses may believe that some portion of these costs could also be~~ characterized as generic voter drive costs, which are defined at 11 CFR 106.5(a)(2)(iv) to include, inter alia, costs of "activities that urge the general public to ~~register, vote or~~ support candidates of a particular party or associated with a particular issue, without mentioning a specific candidate."

Aikens

Although you state that the advertisements in question will not reference Federal elections or contain an electioneering message, their stated purpose--to gain popular support for the Republican position on given legislative measures and to influence the public's positive view of Republicans and their agenda--encompasses the related goal of electing Republican candidates to Federal office. This result is also contemplated by the Commission's regulations at 11 CFR 110.8(e), which recognize that certain party-building activities under specific conditions can feature the appearance of the party's candidates at a "bona fide party

4 event or appearance." Advocacy of the party's legislative
5 agenda is one aspect of building or promoting support for the
6 party that will carry forward to its future election
7 campaigns.

8 For purposes of the allocation rules, however, it is
9 immaterial whether these costs are characterized as
10 administrative costs or as generic voter drive costs. Under
11 11 CFR 106.5(b)(2), the costs of both types of activities are
12 allocated 60% to the Federal account and 40% to the
13 non-federal account in non-presidential election years, and
14 65% to the Federal account and 35% to the non-federal account
15 in presidential election years. FEC Schedules H3 and H4, on
16 which joint activity is reported, similarly do not
17 distinguish between administrative and voter drive costs.
18 Rather, they classify them jointly as "administrative/voter
19 drive" costs.

20 Since 1995 is a non-presidential election year, the
21 Commission concludes that the proper allocation for these
22 expenditures is at least 60% to the Federal account, with a
23 corresponding allocation to the non-federal account.^{5/}

24 ^{5/} The Commission notes that, while committees are free to
25 allocate a higher percentage of the disbursement to their
26 Federal accounts (the language in section 106.5(b)(2)(i)
27 reads at least 60% (emphasis added), they may not so allocate
28 less than the specified percentages. See Explanation and
29 Justification to the Final Rules on Methods of Allocation
30 Between Federal and Non-Federal Accounts, 55 Fed. Reg. 26058,
26063 (June 26, 1990).

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3 Page 8

4 Should the RNC continue these activities into 1996, a
5 presidential election year, the Federal share will rise to at
6 least 65% of these costs.

7 This response constitutes an advisory opinion concerning
8 application of the Act, or regulations prescribed by the
9 Commission, to the specific transaction or activity set forth
10 in your request. See 2 U.S.C. §437f.

11 Sincerely,

12 Danny Lee McDonald
13 Chairman

14 Enclosures (AOs 1985-14, 1984-57 and 1984-15)
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